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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 687 - 688

METROPOLITAN TRUST CO., AS CONSERVATOR FOR STANLEY O. LAWRENCE, an incompetent person,
Petitioner,

vs.

THE MUTER COMPANY AND LESLIE F. MUTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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I. The judgment of the Court of Appeals is more than a flagrant violation of Rule 52(a); it denies plaintiff due process of law.

(a) The Court of Appeals, by a divided court, reversed the judgment for the plaintiff solely on the basis that a release signed by plaintiff was supported by consideration, consisting of a salary increase given plaintiff by defendants, although the plaintiff testified and the defendants conceded in their sworn answer and testimony that the salary increase was not consideration for the release, and the trial court upon such *uncontradicted* testimony and pleadings found that there was no consideration for the release.

(b) The action of the Court of Appeals was a mere arbitrary and capricious exercise of power and was in clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights, apart from Rule 52 (a). Their action was not merely procedurally erroneous; their action substantively deprived plaintiff of his property without due process of law.

(c) The federal judiciary is no less limited by the due process clause of the Fifth Amendment than the federal legislature.

Authorities Cited.

Cases.

Amer. Ry. Express v. Kentucky, 273 U. S. 269, 273, 71 L. Ed. 639, 47 S. Ct. 353 6
Andrew Jergens Co. v. Conner, 125 Fed. (2nd) 686 20
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Katz Underwear Co. v. U. S., 127 Fed. (2nd) 965 20
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Mosby v. Chapin, 217 Ill. A. 442 17
Occidental Life Insurance Co. v. Thomas, 107 Fed. (2nd) 876 20
Sundt v. Turman Oil Co., 107 Fed. (2nd) 762 20
Toffenetti v. Mellor, 323 Ill. 143, 153 N. E. 825 17
United States v. U. S. Gypsum Co., 68 S. Ct. 525, 92 L. Ed. 552, 333 U. S. 364, 395 21
Virginia R. Co. v. U. S., 272 U. S. 658, 675, 71 L. Ed. 463, 47 S. Ct. 222 6

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Textbooks.

Williston, Treatise on Law of Contracts, Sec. 1820.... 17
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Metropolitan Trust Company of Chicago, as Conservator for Stanley O. Lawrence, an incompetent person, the plaintiff-appellee and cross-appellant below, respectfully prays that a writ of certiorari be issued out of this Honorable Court to review the judgment (R. 743, 744) of the Court of Appeals for the Seventh Circuit, entered November 12, 1948, reversing the judgment of the United States District Court for the Northern District of

Illinois, Eastern Division, which was rendered in favor of the plaintiff, Stanley O. Lawrence, against the defendants, The Muter Company, a corporation, and Leslie F. Muter, for $128,438.33.

OPINIONS BELOW.

The findings of fact and conclusions of law of the district court are not reported. They appear at pages 670-678 of the record. The opinion of the Court of Appeals (R. 731-742) is reported in 171 F. (2d) 380.

JURISDICTION.

The judgment of the United States Court of Appeals was entered November 12, 1948. Petition for rehearing was timely filed on November 26, 1948. It was denied on January 4, 1949. The jurisdiction of the court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 26 Stat. 828, Ch. 517, Sec. 6, as amended, 36 Stat. 1157, Ch. 231, Sec. 240, 43 Stat. 938, Ch. 229, Sec. 1, Title 28 U. S. C. A. Sec. 347. This petition is timely filed in accordance with 26 Stat. 828, as amended, Title 28 U. S. C. A. Sec. 350.

QUESTIONS PRESENTED.

(1) Whether this Court will exercise its power of supervision over a Court of Appeals where such Court reverses a judgment for a plaintiff, by arbitrarily and capriciously refusing to follow fact findings of the District Court, which were supported clearly and unequivocally by the *undisputed* evidence on *both sides*, because, in reality, the judgment of the Court of Appeals denied the plaintiff that due process of law, which is guaranteed to him by the fifth amendment to the Constitution of the United States.

SPECIFICATIONS OF ERROR.

We respectfully submit that the court below erred:

1. In failing to affirm the judgment of the trial court.

2. In so arbitrarily and capriciously disregarding or overruling findings of fact of the trial court, which were supported clearly and unequivocally by the undisputed evidence on *both sides*, that the Court of Appeals not only flagrantly violated Rule 52(a), but in reality denied the plaintiff due process of law.

STATEMENT.

Plaintiff filed an action in equity against the defendants for breach of fiduciary relationship and fraud, arising by reason of the wrongful appropriation of plaintiff's stock interest in General Manufacturing Company, a corporation, which defendants consolidated with defendant Muter Company.

The trial court found that defendants should have issued plaintiff 14,654 shares of Muter Company stock for his stock in General Manufacturing Company, but that defendants issued plaintiff only 2,000 shares of Muter Company stock; that defendants defrauded plaintiff out of 12,654 shares of Muter Company stock, and gave plaintiff judgment against both defendants for $128,438.33, representing the market value of the stock and accrued dividends thereon (R. 677-679).

About one year after the trial, the plaintiff, Stanley O. Lawrence, was adjudicated an incompetent. Metropolitan Trust Company, his Conservator, was substituted for him in the Court of Appeals.

The judgment was reversed by the Court of Appeals for the Seventh Circuit by a divided court. Judge Minton

wrote the majority opinion (R. 731-740). Judge Kerner wrote a dissenting opinion (R. 740-742).

The majority opinion agreed with the trial court that the defendants defrauded the plaintiff; that the plaintiff clearly was entitled to judgment on that basis alone; that the defendants had no defense for their fraud unless a release signed by plaintiff was supported by consideration (R. 735-736).

The majority held that an increase in salary which was given plaintiff by defendants about the time he signed the release constituted a valid consideration for the release. Upon that basis alone, the Court reversed the judgment for plaintiff.*

There was no evidence at all which supported this finding of the majority. The uncontradicted evidence on both sides was that there was no consideration for the release.

The defendants in their sworn answer admitted that the salary increase was given plaintiff solely because plaintiff assumed greater duties and responsibilities (R. 135). Defendants did not even infer, much less plead or testify, that the salary increase was intended as consideration for plaintiff's signing the release (R. 186, 553, 558). No party or witness on either side said so.

Yet the majority of the court below said so.

This is not merely a flagrant violation of Rule 52(a). This is a denial of plaintiff's right to due process of law.

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* The majority opinion states:
(a) "In our view, the disposition of this case turns on the effect of the release (R. 734)."
(b) "The principal question before us is the legal consequence of the release (R. 735)."
(c) "But it seems to us that however meritorious the plaintiff's claim or reprehensible the defendant's conduct may have been, the former was released and the latter forgiven by the letter which the plaintiff read, signed, and sealed (R. 736)."

The dissenting opinion states (R. 741):
"The controversial issue is the effect of the alleged release."

REASONS RELIED UPON FOR ISSUANCE OF THE WRIT.

The judgment of the Court of Appeals is a mere arbitrary and capricious exercise of power and is in clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. The judgment is not merely violative of Rule 52(a); it denies the plaintiff due process of law.

The judicial as well as the legislative power of the Federal Government is limited by the Fifth Amendment (*Hovey* v. *Elliott*, 167 U. S. 409, 42 L. Ed. 215, 17 S. Ct. 841).

Assume a hypothetical Federal Employer's Liability Act case; in which the railroad's defense was solely that it was not negligent, and in which the railroad conceded both in its answer and by its testimony that a release signed by the plaintiff was not supported by consideration, and that an increase in salary which was given the plaintiff was given solely because he was considered capable of taking a more difficult job, because of his background. Assume further that no witness testified that the salary increase was consideration for the release; that no witness even inferred that the salary increase was consideration for the release. Assume further that the plaintiff had a judgment; that the Court of Appeals agreed with the trial court that the railroad was negligent, yet reversed the judgment solely on the ground that the release was supported by consideration consisting of the increase in salary.

Would not this Court say that there had been a clear denial of due process of law to the injured person?

For United States Courts of Appeals are limited in the exercise of their power of review. They may not be arbitrary. They may not be capricious. Their judgment may not be in clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights (Compare *Amer. Ry. Express* v. *Kentucky*, 273 U. S. 269, 273, 71 L. Ed. 639, 47 S. Ct. 353).

No extensive citation of authorities is required to show that historically in our system of jurisprudence, courts of review may not set aside findings of fact of the chancellor in equity cases which are based upon uncontradicted evidence (2 Street, Federal Equity Practice (1909), Secs. 1510, 1514; *Virginia R. Co.* v. *United States*, 272 U. S. 658, 675, 71 L. Ed. 463, 47 S. Ct. 222).

Just how far may a Federal Court of Appeals go in disregarding findings of fact? Does it not become a question of degree? As has been said by an esteemed Justice of this Court, do not most questions of law become questions of degree?

This case presents an identical analogous situation to the hypothetical negligence case.

The defendant, Muter, said the salary increase was not consideration (R. 186, 553, 558). The plaintiff said the salary increase was not consideration (R. 215-218). The sworn answer of defendants said the salary increase was not consideration (R. 135). No witness testified that the salary increase was consideration. No witness even inferred that the salary increase was consideration. The defendants did not plead or even infer that the salary increase was consideration (R. 135).

Yet the majority court of the court below held that they could not say that the salary raise was not consideration

(R. 738). And, therefore, they said the salary raise was consideration (R. 738).

Is this merely a procedural violation of Rule 52(a)?

The plaintiff had a judgment. A judgment is property. He has been deprived of that property. He has been deprived of that property by arbitrary and unconstitutional action—not action merely erroneous.

Has the plaintiff no remedy? Is the disinclination of this Court to review cases reversed upon the facts to prevent the plaintiff from obtaining the only redress open to him—review by this Court? If so, perhaps Rule 38 of this Court is vulnerable to constitutional attack. For Article III of the United States Constitution has vested in this Supreme Court final jurisdiction to protect persons in obtaining due process of law. If a court of review, whether state or federal, denies a person due process of law, by making a mistake so gross as to be impossible in a rational administration of justice, he should have an absolute right to review by this Court (*Chicago Lf. Ins.* v. *Cherry*, 244 U. S. 25, 30, 61 L. Ed. 966, 37 S. Ct. 492; 12 Am. Jur., Sec. 577, pg. 274).

The finding of the majority of the court below was contrary to:

(a) the finding of the trial court;

(b) the sworn answer of defendants;

(c) the testimony of defendant Muter;

(d) the testimony of plaintiff;

(e) the law governing increases in salary during the war.

(a) The Finding of the Court of Appeal Was Contrary to the Explicit Finding of the Trial Court.

The trial court's findings of fact concerning the release are much more explicit than as stated in the majority opinion.* The trial court found,

(1) "Defendants did not pay to Lawrence any money, property or stock *or any other consideration* at that time or thereafter for his interest in General Manufacturing Company" (Fdg. 29, R. 675).

(2) "All salaries that plaintiff received from General Manufacturing Company and from The Muter Company were fair compensation for his services and in no way constituted any consideration for his interest in General Manufacturing Company" (Fdg. 16, R. 674).

The language of the majority of the court below is strange and perplexing. They admit that the finding that the release was not supported by consideration *is sustained by the evidence in so far as nothing was expressly given* for the release. Either the salary increase was or was not, in fact, intended to be consideration for the release. And since defendants admitted that it was not intended to be consideration, the Court of Appeals was simply arbitrary in saying that they could not say as a matter of

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* On the vital issue of the release, the majority said (R. 738):

"Although the trial court made a finding supported by the evidence that at the time he executed the release, the plaintiff received no money or other property for his interest in General, this finding is sustained by the evidence only so far as nothing was expressly given for the interest claimed. * * * Despite the plaintiff's assertion and the finding below that this transaction amounted to nothing more than a fixing of a higher value for the plaintiff's services, we cannot say as a matter of law that this transaction must be disassociated from the subject matter of the release. A more reasonable interpretation, it seems to us, is that Muter entered into this new arrangement in order to placate the plaintiff and put an end to his recurring demands. Reference in Muter's oral remarks, testified to by the plaintiff, as well as in the release, to previous conversations, confirms our conviction that the increase in compensation ties in with and supplies valid consideration for the release."

law (without citing any law) that the increase in the plaintiff's salary must be disassociated from the subject matter of the release, and in then coming to the capricious conclusion that the salary increase was consideration for the release.

(b) The Finding of the Court of Appeals Was Contrary to the Sworn Answer of Defendants.

Paragraph 14 of the defendants' sworn answer reads (R. 135):

> "These defendants deny the allegations of the first sentence of Paragraph 14 and state the facts to be that during the year 1943, Mr. J. R. Scanlan, Sales Manager for The Muter Company, who was then receiving 1% of the net sales of the Company as his remuneration, left the employ of the Company. It was thought at this time that the plaintiff would be capable of handling the position of Assistant Sales Manager *because* of his background and, *therefore,* an application was made to and approved by the Salary Stabilization Unit authorizing the plaintiff to receive one-half of 1% of the net sales of The Muter Company as Assistant Sales Manager, said compensation to be effective as of February 1, 1943; that plaintiff's compensation for the year 1943 amount to $14,107.59. The payment of this compensation was at all times subject to satisfactory performance of his duties on the part of plaintiff, *and this arrangement for compensation was made to allow the plaintiff, along with other employees of The Muter Company to participate in a financial way in the increased activity of the Company due to the war work.* After his compensation had been increased as hereinabove set forth, the plaintiff willingly executed the Release described in this first sentence of Paragraph 14 of the Complaint. This Release under seal was entirely voluntary on the part of the plaintiff and was executed in the presence of two witnesses. No threats or intimidation whatsoever were employed at this or any other time against the plain-

tiff. Plaintiff at this time expressed himself as being completely satisfied with this situation."

Thus the sworn Answer of the defendants expressly and unequivocally negatives any implication or inference that the increase in plaintiff's salary "ties in with and supplies valid consideration for the release", as found by the majority of the court below, contrary to the finding of the trial court.

No language could be more clear than the admission in the defendants' answer that the increase in Lawrence's salary in 1943 was not impliedly, indirectly or directly or otherwise in payment for his stock interest in General, but on the contrary was solely intended to pay plaintiff for the additional duties and responsibilities of his new position:

> "It was thought at this time that the plaintiff would be capable of handling the position of Assistant Sales Manager *because* of his background and, *therefore,* an application was made to and approved by the Salary Stabilization Board * * *" (R. 135).

The majority of the court below not only disregarded this positive admission in the sworn answer of the defendants, but they *assumed* the exact opposite to be the fact. This is what they did syllogistically:

> Major Premise (Admitted Facts): The defendants admitted in their sworn answer that the reason that plaintiff received a salary increase *was* that the defendants thought plaintiff would be capable of handling the more important position of Assistant Sales Manager because of his background and, therefore, plaintiff's salary was increased; and the payment of plaintiff's compensation *was* at all times subject to satisfactory performance of his duties on the part of plaintiff, and this arrangement for compensation *was made* to allow the plaintiff along with other employees of defendant company to participate in a financial way

in the increased activity of the company due to war work (R. 135).

Minor Premise (Assumption of the Court of Appeals): Regardless of what defendants positively admitted, we *assume* that the reason that plaintiff received a salary increase *was not* that the defendants thought plaintiff would be capable of handling the more important position of Assistant Sales Manager because of his background, and we *assume* it is *not* the fact that, therefore, plaintiff's salary was increased; and we *assume* the payment of plaintiff's compensation *was not* at all times subject to satisfactory performance of his duties on the part of plaintiff, and we *assume* this arrangement for compensation *was not* made to allow the plaintiff along with other employees of defendant company to participate in a financial way in the increased activity of the company due to war work.

Conclusion of Court of Appeals Assumed Contrary to the Admitted Facts:

(1) Based upon our *assumption*, we cannot say that the salary increase was not given the plaintiff for his interest in General Manufacturing Company.

(2) Therefore, we *assume* the increase in salary was given the plaintiff for his interest in General Manufacturing Company.

(c) The Finding of the Court of Appeals Was Contrary to the Testimony of Defendant, Muter.

Muter, testified (R. 186):

"Q. *Now, you have never given Mr. Lawrence any more than 2,000 shares of The Muter Company stock for his 40 percent interest in Gen-Ral Corporation, is that correct?* A. *I believe that is correct.*

Mr. Kennelly: That is all.

The Witness: A. But we have provided Mr. Lawrence with a certain background that enabled him to make considerably more in the way of revenue by his association with us, than he would have otherwise.

By Mr. Kennelly: Q. But that was merely for services? A. That is services in our judgment that are terminable at any time."

Muter further admitted that Lawrence performed his work satisfactorily (R. 553) and also testified (R. 558):

"Q. All right. Now, in 1943—in June of 1943—the check that Mr. Lawrence got for some $5,000 was for services, is that right? A. Yes, sir.

Q. Did Mr. Lawrence get any stock from you at that time? A. No, sir.

Q. Did you give any money to Mr. Lawrence at that time, in June—May or June of 1943—other than these two checks which were for services and salary? A. No, sir.

Q. *All of the money that Mr. Lawrence received, Mr. Muter, from The Muter Company, from and after December, 1939, was for services and salary?* A. *Yes, sir.*"

The majority of the court below not only disregarded these positive admissions in the testimony of defendant, Muter, but they *assumed* the exact opposite to be the fact. This is what they did syllogistically:

Major Premise (Admitted Facts): The defendant, Muter, admitted in his testimony that defendants had never given plaintiff any more than 2000 shares of Muter Company stock for his interest in General Manufacturing Company; that all salaries that plaintiff received from the Muter Company were for services performed satisfactorily.

Minor Premise (Assumption of the Court of Appeals): Regardless of what the defendant, Muter, admitted, we *assume* the defendants have given plaintiff more than 2000 shares of Muter Company stock for his interest in General Manufacturing Company, because we *assume* that all salaries that plaintiff received from the Muter Company were not for services performed satisfactorily, but were also for his interest in General Manufacturing Company.

Conclusion of Court of Appeals Assumed Contrary to the Admitted Facts:

(1) Based upon our *assumption*, we cannot say that defendants have never given plaintiff any more than 2000 shares of Muter Company stock for his interest in General for we cannot say that all salary that plaintiff received from defendants was for services performed satisfactorily.

(2) Therefore, we *assume* that the increase in salary was given the plaintiff for his interest in General Manufacturing Company.

(d) The Finding of the Court of Appeals Was Contrary to the Testimony of Plaintiff.

The majority opinion not only misstated, but what is much worse, half-stated the testimony of plaintiff. A half-truth is more dangerous than an untruth, because it is more difficult to answer. The majority opinion omitted to state the important fact that plaintiff testified that defendant, Muter, told him about the time he signed the release that his additional stock interest would be worked out after the war, and that his increased compensation was not in lieu of his additional stock in Muter Company.

The majority opinion incorrectly paraphrased the plaintiff's testimony concerning the release as follows (R. 738):

> "The plaintiff testified that a couple of days prior to the execution of the release, he had again reminded Muter of his claim and asked him to work out 'something for my interest, percentage or something'; that Muter had promised to 'get through an arrangement with * * * War Salary Stabilization Board—for one-half of one percent of the net sales of the Muter Company'; that on June 29, 1943, Muter brought the letter into the plaintiff's office and said: 'This is relative to that temporary arrangement we talked about the other day,' adding that the new arrangement was to be made retroactive to February. It was shortly thereafter that the plaintiff went into Muter's office,

signed the release, and received two checks dated June 30, one for $5,117.75 and the other for $513.27, or a total of $5,631.02, representing his compensation for the five months ending June 30 on the new basis."

But, this is what plaintiff actually testified (R. 215-218):

"Q. Now, when next did you have a conversation, if any, with Mr. Muter, relating to your interest in Gen-Ral Manufacturing Company? A. At the—during the accounting period, at the end of 1942 and beginning of 1943. I asked—

Q. Where did that conversation take place? A. That was in the offices of The Muter Company.

Q. Who was present? A. Mr. Muter and myself.

Q. State what was said and done by you and what was said and done by Mr. Muter at that time, if anything. A. I asked Mr. Muter again about my stock interest and what arrangements he was making on my whole set-up, and he said that he was working it out. He had given me a substantial bonus of a thousand dollars, and he told me that he would raise my salary to $85 a week, and wanted to know if that didn't make me happy.

I told him I appreciated it.

I asked him if the bonus he had given me had anything to do with the rest of my stock interest in the company. He said no, it didn't have anything to do with that; he intended to work that out, but due to war regulations and salary stabilization limitations, that he hadn't been able to get to it; that if I would just let him go ahead and work it out, why, he would.

I told him I'd leave it up to him; however, I wanted to ask him if he couldn't get something through for me, because I was getting uneasy about it because the company was growing so large.

Q. Now, that was, you say, in 1943, the early part? A. The first part of 1943.

Q. What happened next? Did you receive one-half of one percent? A. About the second quarter of the year we had another conversation.

Q. Where did that conversation take place? A. That was in the office of The Muter Company.

Q. Who was present? A. Mr. Muter and myself.

Q. Anyone else? A. Mr. Dailey, I believe, was there at the time.

Q. State what was said at that conversation, if anything. A. I asked Mr. Muter to work out something for my interest, percentage or something; that I didn't feel I was even participating in the picture as much as I should at the time.

He said, well, he couldn't straighten out my stock interest or work out a percentage, that he had been talking to me on the basis he had intended.

He said he could get through an arrangement with the War Labor Regulations—or War Salary Stabilization Board—for one-half of one percent of the net sales of the entire Muter Company.

He told me if I would go along on that as a temporary basis and let him work the stock interest and the whole matter out after the war, that he would make arrangements to pay that until the end of the war and work the whole thing out afterwards.

Q. When next did you have a conversation relative to your interest with Mr. Muter, if any? A. It was a couple of days after that meeting.

Q. Will you tell the Court—who was present at that time? A. Mr. Muter and myself.

Q. State what was said. Where did it take place—in his office or where? A. In my office. He came into my office.

Q. You and Mr. Muter? A. Yes.

Q. Will you state now, go ahead and state what was done and said by you and Mr. Muter at that time? A. Mr. Muter brought a letter into my office and he said, 'This is relative to that *temporary* arrangement we talked about the other day,' and he said he was going to make my interest, or my payment on the one-half of one percent of the net sales retroactive back to February, about, of that year and bring the matter up to date, *and he said that after the war they would work it out,* and he wanted me to sign that letter.

Q. I show you a paper marked Plaintiff's Exhibit 58 for identification, and ask you to examine it and state whether or not that is the letter that he handed you that day? A. Yes, that looks like the letter.

Q. Did you get a copy of that, Mr. Lawrence? A. No, I didn't get a copy of that letter.

Q. Did you read that letter, Mr. Lawrence, at that time? A. I glanced at it while Mr. Muter waited for it and handed it back to him.

Q. You didn't get a copy, you said; is that right? A. No, I didn't get a copy.

* * *

Q. At the time you signed that letter, Mr. Lawrence, did you receive any additional stock other than the 2,000 shares in The Muter Company? A. No, I received none.

Q. Did you receive any money? A. No, I didn't receive no money.

Q. Did you receive any property of any kind? A. Nothing."

Plaintiff's testimony is clear that Muter was guilty of actual fraud in procuring his signature to the release. The trial court made a finding that "Lawrence signed the letter in reliance upon Muter to fairly account to him after the war * * * that the transaction by which Muter * * * obtained the letter from Lawrence was fraudulent in fact to Lawrence." (R. 675.)

When Lawrence signed the letter he was and had been Muter Company's employee for several years. It was a most natural thing for him to sign a letter for Muter with only a glance at it in reliance upon Muter's promise to issue, at a later date, the additional stock due plaintiff. The surrounding circumstances and the relationship of the parties, even though not a fiduciary relationship, are factors to be considered in determining whether the release may bar plaintiff from recovery. As stated in 45 Am. Jur., pg. 686: "The General principle that fraud vitiates every act applies to releases. A nominal or grossly inadequate consideration for a release will, in connection with other circumstances, such as the releasor's situation, conduct and surroundings at the time of the release * * * be given

serious consideration as affecting the question of fraud in its procurement. * * *"

It is obvious that a mere increase in salary for a new and more important position from which plaintiff could be discharged immediately at will was never intended to constitute consideration for the release of a claim for over $100,000. Even defendants did not have the temerity to so contend.

But even assuming that the Court of Appeals was correct in setting aside the finding that the release was procured from Lawrence by actual fraud, there is absolutely no testimony or evidence in this record on the part of either side which warranted that court in setting aside the finding of Judge Igoe to the effect that there was no consideration whatever for the release. Under such circumstances the release in this action in equity was void for want of consideration under the cases cited by the majority of the Court of Appeals (*Toffenetti* v. *Mellor*, 323 Ill. 143; 153 N. E. 825; Williston, Treatise on Law of Contracts, Sec. 1820; *Mosby* v. *Chapin*, 217 Ill. App. 442).

The majority of the court below not only disregarded the testimony of the plaintiff but misrepresented his testimony.

> Major Premise (Undisputed Testimony of Plaintiff): Plaintiff testified that defendant, Muter, told him when he was given his salary increase that the salary increase had nothing to do with his additional stock interest in Muter Company.
>
> Minor Premise (Assumption of Court of Appeals): Regardless of what the plaintiff testified and regardless of the fact that his testimony is not only undisputed, but corroborated by the testimony and the sworn answer of the defendants, we cannot say that Muter did not tell plaintiff that the salary increase was in lieu of his additional stock interest in Muter Company.

Conclusion of Court of Appeals, Assumed Contrary to the Undisputed Testimony of Plaintiff:

Therefore, we assume that Muter did tell plaintiff that his salary increase was for his interest in General, and therefore, we further *assume* that the salary increase was consideration for his interest in General.

(e) The Finding of the Court of Appeals was Contrary to the Law Governing Increases in Salary During the War.

In order for the Court of Appeals to find that the increase in the plaintiff's salary was consideration for his release of his claim to additional stock in his employer Muter Company, the majority of the Court of Appeals *assumed* that the defendant Muter Company was guilty of a positive violation of the Emergency Price Control Act concerning salary stabilization during the war. An increase in salary during the war could not constitute lawful consideration for the release of an employee's claim against his employer.

The law which governed increases in salary during the war is clear that increases in salary could not be granted for any such reason as to constitute consideration for the purchase of stock from an employee. (U. S. C. A. Tit. 50 App. 901, Executive Order 9250, Tit. II.) During the war, an increase in salary, in order to be approved by the Salary Stabilization Board, had to be warranted by the increased responsibility of the employee. The salary increase had to be for work done and for no other reason. The defendants have admitted unequivocally that Lawrence's increase in salary was given to him solely because the defendants considered him capable "of handling the position of Assistant Sales Manager because of his background".

The Salary Stabilization Unit of the Treasury Department approved the salary increase for Lawrence pursuant

to the Emergency Price Control Act and the President's Executive Orders pursuant thereto (U. S. C. A. Tit. 50 App. 901, Executive Order 9250). (Defendants' Exhibit 11.)

The effect of the majority opinion below is that they *assume*, without any supporting evidence or pleadings, that defendants were guilty of a direct and positive fraud upon the United States Government in obtaining a salary increase from the Salary Stabilization Board of the Commissioner of Internal Revenue for Lawrence by subterfuge in order to pay him for stock purchased from him in 1939.

Is it not strange that a federal court of appeals not only improvised but sanctioned as a defense in a fraud case, a clear-cut violation of federal law?

Therefore, the majority of the court below not only disregarded positive admissions in the testimony and answer of the defendants as well as the testimony of plaintiff, but in order to find that the salary increase was consideration for a release by plaintiff of his claim to more stock in Muter Company, they had to *assume* that defendants were guilty of a violation of United States law governing salary increases during the war.

CONCLUSION.

We are aware of the disinclination of this Court to review cases which turn upon the facts. But this case is a classic example of an utter and arbitrary disdain for Rule 52(a).

If Rule 52(a) can be ignored to the extent that it was ignored in this case, then the rule may as well be abrogated. For the rule has no meaning in reality. And litigants have no redress in reality when their judgments are arbitrarily reversed on the facts by a court of appeals,—without refer-

ence to the pleadings or the evidence which support the fact findings—without reference to Rule 52(a)—without even saying that the findings are erroneous much less clearly erroneous. Judge Kerner in his dissenting opinion pointed out that the findings were supported by the evidence when he said (R. 742):

> "I doubt that it would serve any useful purpose to detail the evidence relating to this issue. I believe it will be enough to say that I have examined the evidence and the testimony of all the witnesses heard, considered the inferences fairly to be drawn from all the evidence, and have reached the conclusion that Judge Igoe's findings are supported by the evidence. That was enough. Hence the findings are not clearly erroneous. In this situation, they are inescapably binding on this court. They must stand undisturbed on appeal. Rule 52(a) Federal Rules of Civil Procedure, 28 U. S. C. A. following Sec. 723c."

In each circuit the Court of Appeals has recognized (1) They may not inquire to ascertain other than whether a finding is clearly erroneous; (2) They may not set aside a finding of fact merely because the reviewing court would have found differently in the record; (3) They may not try the case *de novo: Manning* v. *Gagne*, 108 Fed. (2d) 718, (1st Circuit); *Corbett* v. *Halliwell*, 123 Fed. (2d) 331, (2nd Circuit); *Katz Underwear Co.* v. *U. S.*, 127 Fed. (2d) 965, (3rd Circuit); *Guilford Construction Co.* v. *Biggs*, 102 Fed. (2d) 46, (4th Circuit); *Sundt* v. *Turman Oil Co.*, 107 Fed. (2d) 762 (5th Circuit); *Andrew Jergens Co.* v. *Conner*, 125 Fed. (2d) 686, (6th Circuit); *Campana Corporation* v. *Harrison*, 114 Fed. (2d) 400, (7th Circuit); *Storby* v. *Armour & Co.*, 107 Fed. (2d) 499, (8th Circuit); *Occidental Life Insurance Co.* v. *Thomas*, 107 Fed. (2d) 876, (9th Circuit).

This Court has said (*United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 552) "that a

finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Here, there was no evidence at all which could justify the majority of the Court of Appeals in reaching the "firm conviction" that a mistake was committed by the trial court in finding that the salary increase was not consideration for the release.

We respectfully submit that this case points up a remarkably flagrant disregard not merely of Rule 52(a), but of those fundamental principles which have been established in our system of jurisprudence for courts of review generally.

We respectfully ask this court to grant the writ of certiorari requested herein.

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